

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 200**

**[Docket No. 150227193-5193-01]**

**RIN 0648-BE92**

**Establish a Single Small Business Size Standard for  
Commercial Fishing Businesses**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** NMFS proposes to establish a small business size standard of \$11 million in annual gross receipts for all businesses in the commercial fishing industry (NAICS 11411), for Regulatory Flexibility Act (RFA) compliance purposes only. The proposed \$11 million standard would be used in RFA analyses in place of the U.S. Small Business Administration's (SBA) current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing

(NAICS 114119) sectors of the U.S. commercial fishing industry, respectively. Establishing a single size standard of \$11 million for the commercial fishing industry would simplify the RFA analyses done in support of NMFS' rules, better meet the RFA's intent by more accurately representing expected disproportionate effects of NMFS' rules between small and large businesses, create a standard that more accurately reflects the size distribution of all businesses in the commercial fishing industry, and allow NMFS to determine when changes to the standard are necessary and appropriate.

**DATES:** Comments must be received by *[insert date 30 days after date of publication in the Federal Register.]*

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2015-0061, by either of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0061](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0061), click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- Mail: Send written comments to Mike Travis, NOAA Fisheries Service, Southeast Regional Office, 263 13th Ave S, St. Petersburg, FL 33701.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous), and will accept attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Mike Travis, Industry Economist, at (727) 209-5982.

**SUPPLEMENTARY INFORMATION:**

**Background**

Prior to 2013, SBA had set the small business size standard for all sectors of the commercial fishing industry at the same amount. Since 2005, this standard had been \$4 million in annual gross receipts (revenues). Effective July 22, 2013, SBA established significantly different and higher size standards for the three separate sectors of the industry (78 FR 37398, June 20, 2013): \$19 million for commercial finfish fishing businesses (NAICS 114111), \$5.0 million for commercial shellfish fishing businesses (NAICS 114112), and \$7.0 million for other commercial marine fishing businesses (NAICS 114119). These standards were subsequently adjusted for inflation to \$20.5 million, \$5.5 million, and \$7.5 million, respectively, via an interim final rule, effective July 14, 2014 (79 FR 33647, June 12, 2014). The Small Business Jobs Act of 2010 requires SBA to review all size standards every five years to account for changes in industry structure and market conditions. SBA is also required to assess the impact of inflation on its monetary-based size standards at least once every five years (13 CFR 121.102). However, as reflected by the timing of the two recent rulemakings adjusting the size standards, SBA is not required to conduct the reviews for

these two purposes simultaneously. Thus, these size standards are likely to change on a regular basis.

Under the RFA, an agency must prepare an initial and final regulatory flexibility analysis (IRFA/FRFA) for each proposed and final rule, respectively, unless it certifies that a rule will not have a significant economic impact on a substantial number of small entities. Agencies generally rely on the SBA size standards to identify small entities for RFA purposes. For NMFS, rulemaking activities that have been impacted by changes to the size standards for defining "small" businesses include, but are not limited to, regulatory actions and analyses undertaken pursuant to the Magnuson-Stevens Act (MSA), Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and National Environmental Policy Act (NEPA). Between 2012 and 2014, NMFS published an average of 285 final rules per year, more than 40 percent of which required an RFA analysis, and a majority of those directly regulated commercial fishing businesses. Thus, NMFS' costs of complying with the RFA are significant even when the small business size standards are stable, and those costs increase substantially when the standards are changing on a recurring basis.

NMFS and the Regional Fishery Management Councils (Councils) have encountered significant difficulties implementing and adjusting to the new standards because: 1) the change was from a single size standard for all commercial fishing businesses to three very different standards, 2) many commercial fishing businesses participate in both finfish and shellfish fishing activities, making it unclear which standard to apply in the RFA analyses, and 3) a number of rules simultaneously implement regulations under fishery management plans for both finfish and shellfish species (for e.g., 76 FR 82044, December 29, 2011; 76 FR 82414, December 30, 2011; 77 FR 15916, March 26, 2012; and 80 FR 41472, July 15, 2015), again making it unclear which standard to apply in the RFA analyses.

Furthermore, one of the RFA's primary purposes is to determine if proposed regulations are expected to have disproportionate economic impacts on small businesses relative to large businesses and, if so, to consider alternatives that would minimize any significant adverse economic impacts on small businesses. Under SBA's current standards for commercial fishing businesses, practically

all commercial fishing businesses, and particularly commercial finfish fishing businesses, would likely be determined to be small. Thus, in their RFA analyses, NMFS and the Councils would not be able to discern, consider, or address any disproportionate economic impacts that various regulatory alternatives might have on businesses NMFS and the Councils think are "small" in the commercial fishing industry. Such an outcome effectively precludes NMFS from fulfilling one of the RFA's primary purposes and thus is not desirable.

Section 601(3) of the RFA provides that an agency, after consultation with SBA's Office of Advocacy and after an opportunity for public comment, may establish one or more definitions of "small business" which are appropriate to the activities of the agency and publish such definition(s) in the **Federal Register**. Further, 13 CFR 121.903(c) states that "where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to section 601(3) of the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is

more appropriate for such analysis." NMFS and the Department of Commerce General Counsel's Office had preliminary discussions with SBA's Office of Advocacy about these provisions, and SBA was supportive of NMFS using RFA section 601(3) and 13 CFR 121.903(c) to establish its own size standard for the commercial fishing industry for purposes of RFA analyses only.

SBA has also previously expressed support for the idea of creating a single size standard in instances where industries are closely related, as is the case for the commercial finfish and shellfish fishing industries. In its proposed rule to change the size standard for businesses in manufacturing industries (79 FR 54146, Sept. 10, 2014), SBA stated: "To simplify size standards and for other reasons, SBA may propose a common size standard for closely related industries. Although the size standard analysis may support a separate size standard for each industry, SBA believes that establishing different size standards for closely related industries may not always be appropriate. For example, in cases where many of the same businesses operate in the same multiple industries, a common size standard for those industries might better



reflect the Federal marketplace. This might also make size standards among related industries more consistent than separate size standards for each of those industries." (79 FR 54146, 54150, Sept. 10, 2014).

NMFS has determined that the data used by SBA's Office of Size Standards to develop the new standards are incomplete and, as a result, not representative of all commercial fishing businesses. Specifically, the data used by SBA only account for commercial fishing businesses that have employees (i.e., employer firms), and thus do not include commercial fishing businesses that do not have employees (i.e., non-employer firms). Non-employer commercial fishing businesses typically pay their self-employed crew a percentage of the gross or net revenue on each commercial fishing trip rather than a standard wage or salary, and thus self-employed crew are not considered employees. Commercial fishing businesses with employees represent only about 3 percent of all commercial fishing businesses, while the other 97 percent are non-employer firms.

Further, according to SBA, annual gross revenues for finfish and shellfish commercial fishing businesses with

employees average \$1.6 and \$0.6 million, respectively. Conversely, NMFS determined the annual gross revenues for commercial fishing businesses without employees is only about \$44,000 on average. Thus, NMFS concluded the exclusion of commercial fishing businesses without employees is primarily responsible for the magnitude of the size standard increases, particularly for finfish fishing businesses, and the standards would have been very different if SBA had used data for all commercial fishing businesses. Because the size standards apply to all commercial fishing businesses, not just those with employees, when used to analyze the economic impacts of management actions on directly regulated entities under the RFA, NMFS thinks it is more appropriate to have size standards for RFA purposes that are based on all commercial fishing businesses.

In conjunction with its recent review of size standards, SBA developed a "Size Standards Methodology" for establishing, reviewing, and modifying size standards, where necessary. SBA included it as a supporting document in the electronic docket of the September 11, 2012, proposed rule to change the size standards for the three

sectors of the commercial fishing industry (77 FR 55755) at [www.regulations.gov](http://www.regulations.gov). Application of this new methodology resulted in the significantly different size standards for the three separate sectors of the industry. NMFS referenced this document in developing the proposed size standard in this proposed rule. Consistent with that methodology, SBA used the following industry factors to establish the current size standards for NAICS Sector 11 (Agriculture, Forestry, Fishing, and Hunting): average firm size, as measured by simple average receipts and weighted average receipts; average assets size; the four-firm concentration ratio (i.e., the percentage of receipts accounted for by the four largest firms in the industry); and the Gini coefficient, which measures the degree of inequality in the distribution of firms by receipts size class under SBA's approach.

SBA's primary source of industry data used in the rule to establish the new size standards for the three sectors of the commercial fishing industry was a special tabulation of the 2007 County Business Patterns data from the U.S. Bureau of Census (Census Bureau). This special tabulation provided SBA with data on the number of employer firms,

number of establishments, number of employees, annual payroll, and annual receipts of companies by U.S. industry (6-digit NAICS code). These data were arrayed by various classes of firms' size based on the overall number of employees and gross receipts of the entire enterprise (all establishments and affiliated firms) from all industries. These data allowed SBA to estimate average firm size, the four-firm concentration ratio, and the Gini coefficient.

SBA's Office of Size Standards provided these data upon request to NMFS. NMFS subsequently requested and received from the Census Bureau comparable data for non-employer businesses. NMFS aggregated data to the industry level (i.e., NAICS 11411) for employer and non-employer businesses and then combined these data. Although data confidentiality was not an issue with the non-employer data, prior to aggregation NMFS had to estimate total gross receipts in certain receipts classes for employer firms where the Census Bureau determined the data were confidential and thus could not be released. The combined data provide a complete accounting of the distribution of businesses and receipts by receipt size class category for all commercial fishing businesses. NMFS used these data to

generate estimates of certain industry factors needed to establish a single size standard for the commercial fishing businesses, consistent with SBA's methodology to the extent practicable.

Specifically, NMFS used the data it received from SBA and the Census Bureau to generate estimates of simple average receipts, weighted average receipts, and the Gini coefficient. For simple average receipts, each firm's share of the industry's total receipts is weighted equally, whereas the shares of larger firms receive larger weights in estimating weighted average receipts. Weighted average receipts and the Gini coefficient were estimated using the equations provided in SBA's Size Standards Methodology document. NMFS generated the following estimates for the commercial fishing industry: \$77,178 for simple average receipts, \$12,322,365 for weighted average receipts, and 0.755 for the Gini coefficient. Based on the information in Table 2 of SBA's proposed rule to change the size standards for the finfish, shellfish, and other marine fishing sectors of the commercial fishing industry (77 FR 55755), these estimates support size standards of \$5 million, \$5 million, and \$19 million, respectively.

SBA also considers the average assets size of firms to be an important factor in establishing a size standard. NMFS does not possess and was not able to procure assets size data for non-employer businesses. SBA has such data for employer firms in the finfish and shellfish sectors, though not for employer firms in the other marine fishing sector because of the very small number of firms in that sector. The number of firms in the other marine fishing sector is very small because it includes firms primarily involved in the harvest of corals, sponges, reef associated plants (e.g., algae), and aquarium trade species, whose allowable harvest levels are very small. However, SBA had to purchase the assets size data for employer firms in the finfish and shellfish sectors from a private source and thus could not share the data with NMFS due to their proprietary nature. Therefore, NMFS created an estimate based on data that SBA published in its proposed rule, using the following approach.

According to SBA's proposed rule, the average assets sizes for the finfish and shellfish commercial fishing sectors are \$1.4 million and \$0.4 million, respectively. Finfish fishing firms and shellfish fishing firms represent

approximately 54 percent and 46 percent, respectively, of the 2,039 employer firms in those two sectors combined. Based on these percentages, the weighted average assets size of the combined finfish and shellfish commercial fishing sectors is approximately \$0.94 million. Based on Table 2 in SBA's proposed rule, this estimate supports a \$7 million size standard.

SBA does not consider the average receipts of the four largest firms to be an important factor in establishing a size standard for industries where the four-firm concentration ratio is below 40 percent (i.e., receipts of the 4 largest firms account for less than 40 percent of the total receipts). According to the data SBA provided to NMFS, the four largest firms in the commercial fishing industry are commercial finfish fishing businesses. Within the finfish sector, these firms only account for 29 percent of total receipts within that sector. Therefore, within the larger commercial fishing industry as a whole, the percentage of receipts they account for must be less than 29 percent. Because the four largest firms account for less than 40 percent of the total receipts for the commercial fishing industry, consistent with SBA's

methodology, NMFS did not use the four-firm concentration ratio in establishing a single size standard for the commercial fishing industry.

According to SBA's methodology, all factors should be weighted equally. Therefore, NMFS averaged the standards supported by the simple average receipts (\$5 million), weighted average receipts (\$5 million), Gini coefficient (\$19 million), and average assets size (\$7 million) estimates, which results in a size standard of \$9 million. However, SBA only allowed for eight size standards in its final rule (79 FR 54146, September 10, 2014): \$5 million, \$7 million, \$10 million, \$14 million, \$19 million, \$25.5 million, \$30 million, and \$35.5 million. When the estimated size standard is not equivalent to one of these eight standards, SBA rounds up to the next highest size standard. For NMFS' estimated \$9 million size standard, the next highest size standard would be \$10 million. If the average assets size factor is not included, because it is based on aggregated employer data only rather than a combination of employer and non-employer data, the average of the other 3 factors is \$9.67 million. Thus, the next highest size standard would still be \$10 million.



NMFS is aware the Census Bureau has recently released the 2012 County Business Patterns data for employer firms. However, 2012 data for non-employer firms has not yet been released. As previously discussed, NMFS does not think it is prudent to propose a size standard based only on employer data because 97 percent of the commercial fishing businesses are non-employers. Further, even if the 2012 non-employer data is released and NMFS generates new estimates of the various industry factors, NMFS would still not be able to determine what standards are implied by the new estimates until SBA generates an updated version of Table 2 in its proposed rule to change the size standards for the finfish, shellfish, and other marine fishing sectors of the commercial fishing industry (77 FR 55755) using 2012 rather than 2007 data.

As previously stated, SBA recently implemented a rule to adjust all of its receipts based size standards for inflation using the chain-type price index for the U.S. Gross Domestic Product (GDP price index) (79 FR 33647, June 12, 2014). According to that rule, for all industries with a non-inflation-adjusted size standard of \$10 million, the new inflation-adjusted size standard is \$11 million.

Thus, this rule proposes to establish a small business size standard of \$11 million for all businesses in the commercial fishing industry (NAICS 11411) for RFA compliance purposes only. This single size standard for commercial fishing businesses would be used in all RFA analyses conducted in support of NMFS' regulatory actions. Establishing this single size standard would simplify the RFA analyses done in support of NMFS' rules, better meet the RFA's intent by more accurately representing expected disproportionate effects of NMFS' rules between small and large commercial fishing businesses, create a standard that more accurately reflects the size distribution of all businesses in the commercial fishing industry, and allow NMFS to determine when changes to the standard are necessary and appropriate.

Consistent with SBA's review requirements under the Small Business Jobs Act of 2010 and 13 CFR 121.102, NMFS also proposes to review this standard at least once every 5 years to determine if a change is warranted. A change may be warranted because of changes in industry structure, market conditions, inflation, or other relevant factors. The reviews for these potential reasons will be conducted

simultaneously in order to minimize the frequency of changes to the standard and additional rulemakings.

Consistent with the requirements in 13 CFR 121.903(c), NMFS will formally consult SBA's Office of Advocacy to ensure their concurrence with this proposed action.

### **Classification**

Pursuant to section 601(3) of the RFA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the RFA and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined by the Office of Management and Budget to be significant for purposes of Executive Order 12866 because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the SBA that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is as follows.

The purposes of the rule are to establish a single small business size standard of \$11 million in annual gross receipts for the commercial fishing industry (NAICS 11411), for RFA compliance purposes only, and a requirement for NMFS to assess at least once every 5 years whether this size standard should be changed. The objectives of the rule are to simplify the RFA analyses done in support of NMFS' rules, better meet the RFA's intent by more accurately representing expected disproportionate effects of NMFS' rules between small and large businesses, create a standard that more accurately reflects the size distribution of all businesses in the commercial fishing industry, and allow NMFS to determine when changes to the standard are necessary and appropriate. The RFA and 13 CFR 121.903(c) serve as the legal basis for the rule.

The actions in this rule are administrative in nature and thus would only potentially generate indirect economic effects on commercial fishing businesses. Specifically, the proposed size standard would only affect how NMFS and the Councils determine whether commercial fishing businesses directly regulated by future regulatory actions are small or large, whether and to what extent those

actions have disproportionate economic impacts on those two classes of businesses, and when it is appropriate for NMFS to change the standard in the future. This rule would not impose any new requirements on commercial fishing businesses. Therefore, no small entities would be directly regulated by this rule. This rule would not be expected to affect the behavior or operations of commercial fishing businesses. As such, this rule is not expected to generate any direct economic effects on commercial fishing businesses.

Based on the information above, a reduction in profits for a substantial number of small entities is not expected. Because this rule, if implemented, is not expected to have a significant economic impact on a substantial number of small entities, an IRFA is not required and none has been prepared.

No duplicative, overlapping, or conflicting Federal rules have been identified. This rule would not establish any new reporting or record-keeping requirements.

**List of Subjects in 50 CFR Part 200**

Commercial fishing, Small businesses.

Dated: September 14, 2015

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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory

Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to add 50 CFR part 200 under subchapter A to read as follows:

**SUBCHAPTER A - GENERAL PROVISIONS**

**PART 200-SMALL BUSINESS SIZE STANDARDS ESTABLISHED BY NMFS**

**FOR REGULATORY FLEXIBILITY ACT COMPLIANCE PURPOSES ONLY**

Sec.

200.1 Purpose and scope.

200.2 Small business size standards and frequency of review.

**Authority:** 5 U.S.C. 601 *et seq.*

**§ 200.1 Purpose and scope.**

(a) This part sets forth the National Marine Fisheries Service (NMFS) small business size standards for NMFS to use in conducting Regulatory Flexibility Act (RFA) analyses for NMFS actions subject to the RFA. This part also sets forth the timeframe for NMFS to review its small business size standards.

(b) NMFS has established the alternative size standards in this part, for RFA compliance purposes only, in order to simplify the RFA analyses done in support of NMFS' rules, better meet the RFA's intent by more accurately representing expected disproportionate effects of NMFS' rules between small and large businesses, create a standard that more accurately reflects the size distribution of all businesses in the industry, and allow NMFS to determine when changes to the standard are necessary and appropriate.

**§ 200.2 Small business size standards and frequency of review.**

(a) NMFS' small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing is \$11 million in annual gross receipts. This standard applies to all businesses classified under North American Industry Classification System (NAICS) code 11411 for commercial fishing, including all businesses classified as commercial finfish fishing (NAICS 114111), commercial shellfish fishing (NAICS 114112), and other commercial marine fishing (NAICS 114119) businesses.

(b) NMFS will review each of the small business size standards in paragraph (a) of this section at least once every 5 years to determine if a change is warranted. A change may be warranted because of changes in industry structure, market conditions, inflation, or other relevant factors.

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